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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 77

Filed Nov. 6, 1902.

WILLIAM E. HALE, AS RECEIVER FOR THE COLLECTION AND ENFORCEMENT OF THE LIABILITY OF STOCKHOLDERS OF THE NORTHWESTERN GUARANTY LOAN COMPANY (A CORPORATION), PETITIONER,

vs.

EDWARD P. ALLISON ET ALS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

NO. 290.

WILLIAM E. HALE, as Receiver,

Petitioner,

vs.

EDWARD P. ALLISON, et als.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER IN REPLY.

The grounds of opposition to the right of the receiver to sue, have presented so many and varied technical forms in the case at bar, and others similarly situated, as to justify a brief supplement, by way of reply, upon this single question.

In Hale vs. Hardon, 89 Fed. Rep. 283-288, the Circuit Court held, that the question of right or standing accorded a foreign receiver, depended somewhat upon whether the proceeding was in equity or at law, the intimation being that a more liberal rule existed in this regard in the equitable than in legal tribunals.

In courts of law it was said that the cases present practically three classes of receivers: (1) Those who are true successors in

title; (2) those who have received, by voluntary assignments or by force of title acquired through involuntary proceedings in insolvency or otherwise, underlying support from the corporation itself; and (3) so-called receivers, deriving their authority exclusively from the judicial proceedings in which they are appointed.

As to the first two classes, it was conceded that subject to certain well-established exceptions, foreign recognition and standing would be accorded. The status of the third was held to be no higher than that of masters in chancery and the authority consequently confined within the limits of the jurisdiction of their appointment.

Subsequent to the reversal of this decision (Hale vs. Hardon, 95 Fed. Rep. 747), the question again arose in the same Circuit Court before the same judge, who took occasion to make certain additional observations thereon, as follows:

"Of course, if there were a statute of Minnesota, creating a right of action against corporate shareholders and vesting it, when created, in an official of the State, *or an officer to be appointed by the court*, or in any other person who would make avail of it for a remedial purpose, so that such right of action originated with, and first vested in, the person so named, there can now be no question that, under Article 4, Sec. 1, of the Constitution, requiring full faith and credit to be given in each state to the public acts of every other state, the courts in every other state would be bound to protect the right of action in behalf of, and also in the name of, the person in whom it was vested."

Hale vs. Tyler, 104 Fed. Rep. 757.

The inconsistency between these successive holdings is too clear to require comment.

Under the first announcement, the right is apparently predicated of succession to the title of the corporation, a theory which would absolutely deny the right of a receiver in cases involving stock liabilities, where these, as interpreted by the local law, were matters in which the corporation had no interest and in which no rights could be created by succession to corporate title.

Under the second, the feature of successorship to the corporation is apparently discarded, and in its place, as shown in the quotation *supra*, is substituted a rule which makes the right to sue, dependent upon, (1), a statute providing for the receivership, and (2), vesting, *in the first instance*, the right to sue in such receiver.

As thus stated, it will be apparent that in those states where, either by force of statute or rule of practice, the original proceeding can be instituted by creditors and the stockholders within the jurisdiction brought in, leaving the enforcement as to stockholders beyond the reach of the court's process to ancillary or auxiliary proceedings, no statute can be framed broad enough to invest a receiver with any rights, because *not so invested in the first instance.*

The qualification indicated in the later of these decisions was obviously made in enforced deference to the modern and liberal rule established in the cases of receivers of those states (notably Washington), wherein it is held that the right of creditors in the statutory liability is *impliedly vested* in the general corporate receiver, *as representing all creditor interests*, and, as such, is exclusively enforceable by such receiver, to be commented on hereafter.

Sheafe vs. Larimer, 79 Fed. Rep. 921;
Howarth vs. Ellwanger, 86 Fed. Rep. 54;
Howarth vs. Angle, 162 N. Y. 179;
Howarth vs. Lombard, 175 Mass. 570.

The decisions of the Circuit Court recited above were made in the District of Massachusetts.

Following these, the question was presented to the Supreme Court of Maine, in Childs vs. Cleves, 95 Me. 498, wherein the receivership was identical with that in the case at bar, the cause was at law, and the right of the receiver fully sustained.

After the rendition of the decision last indicated, which, according to every known and recognized principle of procedure, should be held to have settled the question for all tribunals in that state, petitioner presented to the Circuit Court for the District of Maine (the same judge who decided Hale vs. Hardon below and Hale vs. Tyler, presiding), a bill in equity against a distributee of the estate of a deceased stockholder.

Hale vs. Coffin (Mar. 5, 1902, not yet reported.) 51 N.E. Rep 874

In this case under the pretense of discussing the distinction between proceedings in equity and law, the Circuit Court took occasion to review its previous announcements upon the question, holding that if the pending proceeding had been at law, the decision of the Court of Appeals of that circuit (Hale vs. Hardon) would not be recognized, arising as did that case in the Massachusetts district, and that the decision of the Supreme Court of Maine

would not have been recognized as binding on the Circuit Court because in the latter's opinion it changed the established rule, and therefore within the principles announced by the Supreme Court in Burgess vs. Seligman, 107 U. S. 20 was not conclusive.

This review has been made not because the announcements of the Circuit Court are supposed to have established or applied any well defined rule, but rather to illustrate the stubborn resistance with which every step in the progress of the law along liberal lines and those consonant with reason and justice is opposed by unyielding technique and stereotyped dogma.

By such reasoning as that adopted in the cases reviewed, eliminating as it does, the principles which have actuated the courts in establishing and applying what may be termed the modern rule, regulating the right of receivers in foreign jurisdictions, an easy method is discovered for accomplishing the main purpose in view, viz.: enabling domestic debtors to repudiate and escape liability upon a concededly contractual obligation.

These cases are obviously negative in character, establishing as they do, nothing beyond a denial of right to assert and enforce the obligation. They are best classified amongst the obsolete precedents, which mark the course of progress and development of the law as respects the foreign enforcement of stock liabilities, all whereof are based on requiring as a condition to the enforcement, *something a little different from the facts actually presented.*

If we pause for a moment in considering the precise aspect of the question here under review, to propound the inquiry, "how and by whom should this liability be enforced," we are brought face to face with the anomaly arising from the application of the results announced in these decisions of the Circuit Court.

In answering the inquiry suggested, we must concede that neither the corporation nor the general corporate receiver have any right in the obligation in question, for this last is obviously a question of local law to be ascertained and interpreted in the light of local precedent.

We are perforce then reduced to one of three alternatives: (1) That the remedy provided by the local law is so far special and inconsistent with the principles of procedure generally accepted and obtaining in similar cases, as to be of no force and effect beyond the state of domicile; (2) That the right invested in creditors originally continues in such creditors and may neither be affected by statutory provisions providing for a receivership, nor

by a decree of chancery vesting the creditor rights in a receiver when the latter method is appropriate under established principles of chancery procedure; or, (3) That the receivership may be provided by statute or by a decree in chancery in such way as to expressly or impliedly vest in the receiver all the creditor rights so that the latter becomes, to all substantial intents and purposes, a quasi assignee or successor of such rights, or a trustee of an express trust, and, as such, fully authorized to sue.

A consideration of these alternatives will serve, in a measure, to clear up the question of the right of the receiver, which has been, by purely technical considerations, exaggerated into an importance wholly disproportionate to its actual significance.

I.

THE MINNESOTA REMEDIAL LAWS.

It is not proposed to review in any detail these statutes which have been fully discussed in our original brief. We have there shown correctly, as we believe, that these provisions are strictly equitable in their character and are so far identical with the rules of procedure prevailing in equity in similar cases, as to be not inaptly termed *declaratory.*

Under such circumstances it would be anomalous to contend that such statutes are so far *special* as to be limited in effect to the local jurisdiction. It would be far more consonant with both principle and authority to say that these provisions are of such a character as to demand recognition in every tribunal, and that, particularly in a court of equity, the rights thereby recognized and provided for would be enforced by some form of remedy upon the principle "that wherever there is a right, a remedy should be accorded for its enforcement."

This will dispose of the first alternative predicated of a special and unknown procedure embraced in the local law.

II.

CONTINUING RIGHT IN CREDITORS.

This alternative immediately suggests a number of subsidiary inquiries. If the right continues in creditors, who shall be made parties, plaintiff or complainant, in the suit or proceeding for its enforcement?

It is necessarily conceded that the rights of all creditors are common, equal and referable to the conditions prescribed by the local law. Without compliance with the conditions thus imposed, no creditor has any right in the fund to be derived from the enforcement of the liability. The right of creditors in the premises embraces all who become parties to the original proceeding in compliance with the requirements of the statute, and if it continues in creditors, it is necessarily continued equally as to, and for the benefit of all.

The defendants assert, and the lower court affirms the existence of an adequate remedy at law. Should seven or eight hundred creditors, then, join as parties plaintiff in each of forty-seven different actions at law against a single stockholder?

If all need not thus join, may some, less than all, proceed on behalf of all? Can any rule be found *in law* recognizing the latter procedure?

If some may proceed in behalf of all interested, who shall determine upon those who may thus take the initiative?

Is it a race of diligence to get control of the auxiliary proceedings, or is authority invested in some tribunal and somewhere which shall designate the particular parties less than all, who may thus be permitted to bring forward and represent the common right?

If the latter supposition be accepted, would it not be consonant with established rules of procedure to assume that the supposed authority should emanate from the court of primary jurisdiction? If this be assumed (and without it no uniformity of administration can be conceived of), what substantial reason can be suggested why it should not designate in lieu of some less than all the creditors, to represent all, a receiver who should similarly represent all, to thus prosecute the auxiliary proceedings?

Assuming further the continuing right in creditors, is not such right, when submitted to the cognizance of the court (invested in the first instance, under the statutes to which the right is referable, with exclusive primary jurisdiction), subject to be acted upon and affected by the court's decree so as to effectually bind all creditors in interest?

If, therefore, that court designates by its decree to which all creditor interests are parties, a receiver, and invests in that receiver a capacity and authority to sue in behalf of and as representative of all those creditor interests, is not its decree as binding in this as in any other respect?

Put in another form, after such decree, assuming that the rights of creditors in the absence thereof, would be a continuing one, could any or all creditors join in its enforcement, or would they not rather be estopped and precluded in this regard by the provisions of the decree in this respect?

The situation presents two antagonistic interests, creditor and stockholder. If the interest of the former has been so far invested in a receiver as to estop its assertion by the creditor interest in any other manner than through the receiver, and the creditor acquiesces therein, what question of importance is presented when the stockholder interest attempts to question the receiver's authority, and thus, in effect, collaterally assail the decree of appointment?

What interest of substantial character in view of the existing relations does the stockholder have in this question?

Is it of any substantial purport as to him? Has it in anywise affected in any substantial particular his obligation?

In all the numerous forms in which this objection to the capacity of the receiver has been heretofore raised, as well as the opinions which have suggested lack of capacity in the receiver to sue, the inquiries thus suggested have still to be answered. These inquiries are obviously practical, and unless the argument and decisions heretofore advanced and rendered in opposition to our claims are predicated, as we assert, simply on finding some method to defeat the enforcement, have fairly demanded an answer.

The failure in this regard either arises from inability to suggest any substantial or practical solution of the questions, or from a studied attempt at sacrificing substance for form, with the refusal of recognition to those practical considerations which have actuated the great majority of courts under similar circumstances.

The solution of these inquiries is believed to be neither technical nor difficult, if correct regard be accorded established principles. These last may be considered under the third alternative suggested above.

III.

RIGHT OF RECEIVER IN FOREIGN JURISDICTION.

Under this head it is not proposed to re-review the line of argument or authorities contained in our principal brief. It is, however, desired to make some additional reference to authorities not there

cited, and to refer incidentally to certain phases of objection which have been raised upon this phase of the inquiry.

A distinction has been heretofore claimed between what are termed statutory and judicial receivers, so far as the question of right in foreign forums is concerned, aimed at showing a superior standing in the case of the statutory, to that accorded the strict chancery receiver.

This distinction has been sought to be sustained on the assumed fact that the statutory receiver, whether resulting from the voluntary assignment or transfer by the assignor, or by order of the court made pursuant to statute, is invested by force of the statute with title to the interests to which he succeeds, whether these be corporeal in character, or incorporeal, as mere choses in action.

On the other hand, it is claimed that no title devolves by succession upon the receiver of a court of chancery; that he is a mere custodian, as it were, the arm of the court to hold possession as the representative of the court itself, pending the litigation, as defined in Union Bank vs. Kansas City Bank, 136 U. S. 223, in the following language:

"The utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property."

Similarly, Porter vs. Sabin, 149 U. S. 473-479, wherein this court said:

"When a court exercising jurisdiction in equity, appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it."

An examination of the cases thus quoted will show that the language had special reference to the particular facts there presented and that the conclusion sought to be drawn therefrom as respects the power of a court of chancery is wholly unjustifiable.

In the first of these cases, the question of the status of the receiver was purely incidental. Members of a firm had executed a deed of trust for the benefit of creditors. Simultaneously, at the behest of one of the partners, a receiver was appointed for the firm. The latter proceeding was claimed to have effected a modification of

the deed of trust and to have made it the equivalent of an assignment for the benefit of creditors. This court denied the result thus contended for and in this connection used the language quoted.

Porter vs. Sabin, supra, was equally remote from establishing what has been claimed for it in this regard.

Nothing in the opinion indicated, or was intended to indicate, a limitation on the jurisdiction of a court of chancery as respects investing, in a receiver, by force of its decree, title and right so far as was essential to carry out and effecuate the objects of the suit. On the contrary, the other view was clearly indicated from the following language (p 479):

"It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate."

The claimed distinction between so-called statutory and judicial receivers, as applied to corporations generally, is of comparatively small significance. Under nearly all statutory systems relating to corporate insolvency, courts of equity are invested with jurisdiction to appoint receivers. While these receivers derive their authority immediately from the decree of appointment, the creation of the office, as well as the decree itself, is primarily ascribable to the statutory enactment, and the receivers themselves are, in consequence, to all practical intents and purposes, statutory receivers. While such statutory systems generally prevail, it is not to be inferred that the jurisdiction of chancery is exclusively dependent thereon, or may not be invoked in the absence thereof, to effectuate all the purposes ordinarily contemplated by the statutes themselves.

As said by this court in Davis vs. Gray, 16 Wall. 203, 219:

"In the progress and growth of equity jurisdiction, it has become usual to clothe such officers with much larger powers than were formerly conferred. In some states they are by statute charged with the duty of settling the affairs of certain corporations, when insolvent, and are authorized expressly to sue in their own names. As regards statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation, without its aid."

Similarly, it has been said by certain recent commentators on the subject of corporate receiverships:

"It has been clearly held in well considered cases, that aside from the statutory provision, a receiver appointed by a court of equity, by virtue of his appointment, takes title to the personal estate, at least of an insolvent corporation."

Gluck & Becker, Rec'rs on Corp. (2nd Ed.), P 16.

Eliminating the contractual feature involved in this inquiry presented in our principal brief, it is believed that a foreign decree has as much extra-territorial force and effect as a foreign statute, and that the recognition extra-territorially of receivers appointed under the one or the other is neither dependent upon nor referable to this distinction in the origin of their authority.

We have claimed heretofore and still claim, that if any reason exists for a supposed distinction and any higher right is accorded to the statutory than a purely judicial receiver, the question is largely immaterial in the case at bar, because the appointment and character of the receiver here is referable to the local statute and the receiver himself, as a party, is entitled therefore to the status and recognition of a statutory officer.

This claim has been sustained by the decision of the Circuit Court of Appeals of the First Circuit in Hale vs. Hardon, supra, and questioned in a later decision by the Circuit Court of that circuit in Hale vs. Tyler, supra. The decision of the Circuit Court of Appeals has already been quoted on our principal brief and needs not to be referred to again.

Confining ourselves to the position assumed in Hale vs. Tyler, the denial of the statutory character of the receiver in the case at bar is predicated of the language contained in the local statute, Sections 5906, 5907, as follows:

"The court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers."

"If on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed without appointing any receiver to ascertain the respective liabilities of such directors and stockholders and enforce the same by its judgment as in other cases."

The conclusions sought to be deduced from these sections are thus expressed by the court in Hale vs. Tyler, supra:

"This provision has special application to the case at bar, because by prior proceedings, the assets of the corporation had been sequestered by the courts in Minnesota, and the suit which furnished the basis of Hale vs. Hardon and of the present action was a bill brought by a judgment creditor, in behalf of himself and other creditors, for the purpose of enforcing the liability of the stockholders, and for no other purpose. Therefore, as there were no assets of the corporation the title to which could vest in a receiver, and as the right of action against stockholders, according to the findings of the District Court, vested in the judgment creditor who filed the bill, and in the other creditors in whose behalf the bill was filed by him, and as, by the express terms of section 5907, already referred to, the court was not required to appoint a receiver, it followed that Hale was constituted such under the general equity powers of the court, and merely as its hand to assist it in realizing rights of action which vested, not in the receiver, but in the creditors."

This conclusion wholly eliminates the effect of local interpretation as evidenced by the Minnesota precedents and the construction adopted and applied in actual practice.

It assumes that, because the latter section of the statute quoted (5907) provides, in case the corporation is shown to be insolvent and has no assets, the court *may* proceed without appointing a receiver, it necessarily follows that the provisions of the former section (5906), providing that the court may appoint *one or more receivers*, is confined in its application to the general receiver of the corporation.

The answer may be sufficiently demonstrated by reference to the context of the statutes themselves of which the sections quoted form part.

By Section 5897 of the same statute, provision is made for the appointment of a receiver of the corporation at the suit of any judgment creditor after execution returned *nulla bona*. By Section 5902, further provision to the same effect is made, coupled with the authority to the court to appoint a receiver *of the corporation* at any stage of the proceedings.

Sections 5905, 5906 and 5907 have special reference to the proceeding primarily instituted for the enforcement of the stockholders' liability and the provision therein contained that the court "*shall appoint one or more receivers*," interpreted in the light of the context of these sections, obviously includes a receiver for the enforcement of the stock liability. The provisions of Section 5907, to the effect that if the corporation appears insolvent and has no assets, the court *may* proceed without appointing a receiver, is to be construed

not as a limitation upon the jurisdiction or authority of the court in the premises, but rather as leaving it, as in the ordinary case, to the discretion of the court to determine whether the appointment of a receiver will or will not effectuate the ends in view. As thus construed, if all the stockholders' liability to respond were before the court as parties defendant, and the liability could be enforced and collected under the judgments rendered in the original proceeding, the court might proceed in its discretion, without the designation or appointment of a receiver.

But it has been said heretofore on argument that the Supreme Court of Minnesota have negatived the statutory character of the appointment in the following language, excerpted from Hanson vs. Davidson, 76 N. W. Rep., 254:

"There is nothing to prevent the prosecution after such decree is entered of an ancillary action in any other jurisdiction by the receiver appointed, to collect and distribute the fund arising from the stockholders' liability in the original action, or by any other party or person who may be appointed by the court for that purpose, against any stockholder who is not made a party to the original action, to collect from him the amount of his liability on account of the debts of the corporation for the benefit of all creditors." (p. 256.)

It will be seen by reference to the opinion from which the excerpt quoted is taken, that the precise question here involved, to-wit, whether the statute expressly contemplated the appointment of a receiver by the court in the stockholders' suit, was not involved in that case.

The court clearly indicate the propriety of the appointment of a receiver for the purpose of instituting the auxiliary proceedings against stockholders omitted from the original suit and the statement that such auxiliary proceeding might be had by the receiver, or by any other party appointed by the court, would indicate that under the statutes referred to the trial court was possessed of discretion to either designate a receiver and invest him with authority to sue, or to direct such proceeding to be had and taken by some party creditor to the original cause.

In Harper vs. Carroll, 69 N. W. Rep. 610, 618, arising under the Banking Statutes of Minnesota, and involving the same remedial statutes as those in question in the case at bar, the precise point was, however, presented on an objection to the allowance in favor of creditors of the costs and expenses incident to the special receivership. In that case, the Supreme Court of Minnesota say:

"Some of the appellants contend that while the creditors are entitled to recover the amount of their claims, with interest and statutory costs and disbursements, from the stockholders, the latter cannot be required to pay any additional amount of costs and expenses. We cannot so hold. *The statute provides for the appointment of a receiver* and this implies that his expenses may be recovered," etc.

In the case of Zieverink vs. Kemper, 34 N. E. Rep. 250, the question of right to appoint a special receiver in an action to enforce the stock liability, came before the Supreme Court of Ohio under the statutes of that state, which, at the time the decision was rendered, were somewhat similar, but less comprehensive than those under consideration. In that case it was urged that the court was without authority to appoint such a receiver.

Answering this objection, the Supreme Court say:

"We think there is abundant authority in the statutes for the appointment of a receiver in an action to collect the statutory liability of stockholders, and that such is the usual and better practice. But the judgment against the several stockholders should be rendered in the original action brought by a creditor or stockholder as provided in section 3260, Rev. Stat. Such an action is equitable in its nature, and the statutory liability of the stockholders is a trust fund inuring to the equal benefit of all the creditors of the corporation, and this fund is made up from different amounts of money, to be collected from many different stockholders, and to be distributed among many creditors, and no one creditor is more interested in the collection than another. As no preference can be obtained by diligence no one would be specially interested in prosecuting suits for the equal benefit of himself and others; and in such cases it is the usage of equity to appoint a receiver to collect and distribute the fund under the order of the court for the equal benefit of all the creditors. The fact that the right of action is given by statute makes it none the less an equitable action, and, being an equitable action in its nature, requiring the service of a receiver, it is one of those in which receivers have heretofore been appointed by the usage of equity, as provided in section 5587, Rev. Stat."

By reference to the statutes there referred to, it will be found that the statutory authority there held to exist was not contained in the statutes relating to the enforcement of this particular liability, except as such power might be inferred from the general purposes and objects contemplated by the act. The express statutory authority was found in the general provision of the statutes of that state, providing for the appointment of receivers, and amongst oth-

ers, specifying that such appointments might be made "after judgment to carry the judgment into effect."

A similar argument might be predicated with special force of the general statutory authority invested in the courts of Minnesota, with reference to the appointment of receivers as shown by Title 12, Section 5351, Gen. St. 1894, as follows:

"A receiver may be appointed:
"Second. After judgment to carry the judgment into effect.
"Fourth. In the cases provided by law when a corporation has been dissolved or is insolvent.
"Fifth. In such other cases as are now provided by law, or may be in accordance with the existing practice."

In view of these considerations, were it necessary to establish the statutory authority of the local court, the conclusion could be successfully predicated of any one of the following grounds: (1) That the statutes embracing the remedial provisions provide expressly, or by necessary implication, for such appointment; (2) That such provision is made under the general authority to appoint receivers after judgment to carry the judgment into effect in view of the specific provision contained in the remedial statutes that the judgment shall be enforced as in other cases, and (3) That the appointment is clearly within the scope of the powers ordinarily exercised by courts of chancery and is thus expressly conferred by statute in the general provision above quoted, extending the authority of the court as respects such appointments to all the several cases as "are now provided by law or may be in accordance with the existing practice."

But this is believed to be unnecessary as sufficient warrant and authority is found in the statutes expressly applicable to the enforcement of the stock liability.

If the provisions of these statutes were otherwise ambiguous, that construction would naturally be preferred which would more nearly effectuate the purposes in view. It is to be assumed that the legislature contemplated investing the court with the fullest jurisdiction requisite to carry out the obvious purposes of the statute. In consequence, if the designation and appointment of a receiver in the stockholders' suit furnishes the most effectual and appropriate method of accomplishing these purposes, the statute is entitled to a liberal interpretation in this regard and should be held to have contemplated such appointment unless such a construction is opposed to its express terms.

In conclusion upon this particular phase, all doubt in this respect should be resolved by the customary interpretation by the local courts of the provisions of their own statutes. While the cases in which this subject has been referred to in the Supreme Court are nominal in number, it has been the practice and has become an established rule in this regard, to appoint special receivers, with authority to sue, under and by virtue of the provisions of the statutes referred to, and it can now be said without fear of contradiction, that such is the established usage and practice in the courts of that state.

This brings us then finally to the precise question whether such receiver is entitled to recognition and standing in a foreign tribunal.

It has been asserted as one ground of objection to according standing and recognition, that the receiver has no title; that he is neither the assignee of the claims of creditors, or of the right of action incident to such claims.

This objection overlooks (1) That the proceeding is purely statutory and the rights and obligations of all parties referable to those statutes; (2) That the creditors, being parties to the proceeding, are bound by the decree investing in the receiver under and by virtue of the provisions of the statute, the right to proceed to render the judgments obtained by creditors available, and (3) The creditors being thus bound, if it be held that the receiver cannot enforce the liability, it follows, as held by the Supreme Court of Maine in Childs vs. Cleves, 50 Atl. Rep. 714, that there is no one who can maintain the requisite action for its enforcement.

Eliminating these considerations for the present, is it true that technical title or formal assignment are essential prerequisites to suits by receivers respecting the subject matter of the trust confided to their administration?

By reference to the adjudicated cases it will be found that receivers occupy a dual capacity. In the one they succeed to the rights and interests of the defendant in the property confided to their charge; in the other, they occupy an entirely different status as *quasi trustees representing the common interests of creditors.*

Thus it has been stated:

"As a rule, the power of the receiver to sue is limited to the rights of the person or corporation over whose property he is receiver. * * * To this rule there are the following exceptions: (a) Where the receiver by force of some statute *is made the representative of creditors:* * * * (c) Where the receiver is appointed

in a proceeding carried on by creditors, in which the receiver is the representative of the creditors alone and for securing whose claims he is appointed."

Smith on Receiverships, sec. 70, p. 156;
High on Rec'rs, 3rd Ed., sec. 320.

The familiar class of suits by receivers to set aside fraudulent conveyances is an illustration of the exception noted. The right in this regard is clearly accorded not as a successor in title to the assignor or insolvent, on the one hand, or, as a successor in title to the claims of creditors on the other. Such proceedings are predicated upon the theory that the receiver in his person *represents* all creditors in interest, and in his person brings forward and asserts the rights of such creditors.

As a further illustration bearing more closely on the questions presented in the case at bar, attention may be called to the stock liability imposed by the laws of the State of Washington. By some decisions in foreign tribunals this has been held a corporate asset. By reference to the decisions of that state it will be found that such is not the fact, on the contrary, that the liability is held to appertain exclusively to creditors and the authority in the general corporate receiver to sue therefore, is held to accrue by virtue of the fact that he *represents* all creditors in interest.

Wilson vs. Book, 43 Pac. Rep. 939.

This representative character and capacity is purely the result of judicial interpretation, based on grounds of obvious convenience, with the view to effectuating the purposes of the law, and this without regard to any technical title or formal succession by assignment or otherwise.

In the case of Howarth vs. Lombard, 56 N. E. Rep. 888-891, the Supreme Court of Massachusetts said as follows of such a receiver:

"The remaining question is whether an action upon the liability so determined can be maintained by the receiver in his own name. It has been held that an ordinary appointment as receiver, made in another state, will not enable the appointee to sue in this commonwealth in his own name. Wilson vs. Welch, 157 Mass. 77, 31 N. E. 712. If he has a right of property as assignee, he may maintain an action. Iron Co. vs. Webster, 163 Mass. 134, 39 N. E. 786; Ewing vs. King, 169 Mass. 97, 47 N. E. 597. Under a recent statute, an assignee of an ordinary chose in action may sue in his own name.

St. 1897, chap. 402, sec. 1. The tendency is towards greater liberality in this respect. Buswell vs. Supreme Sitting of Order of Iron Hall, 161 Mass. 224-229, 36 N. E. 1065, 23 L. R. A. 846. In the present case the receiver is called by the court in Washington a 'quasi assignee for creditors.' He is charged with the administration of a trust fund which does not take form nor come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors, he is the owner of the legal title to this fund, as a trustee for the creditors."

See also Howarth vs. Angle, 162 N. Y. 179, supra.

The same principle was clearly expressed by the Supreme Court of Pennsylvania in Cushing vs. Perot, 175 Pa. 66, as follows:

"A receiver represents, not only the corporation, but all its creditors; and, as to the latter, it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and common to all; and hence the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit. * * * This is so consonant with convenience and natural justice, as well as with our own settled procedure in analagous cases, that we will not be easily moved to depart from it."

See also Gluck & Becker on Rec'rs., secs. 43-44.

In view of the principles thus established from grounds of obvious convenience and *a fortiori* where reinforced by statutory provisions, the power and authority of a receiver in the representative capacity indicated to sue in behalf of creditors, without regard to title or succession, is clear.

To satisfy purely technical considerations, it has been held in some cases that such title as was requisite to fulfill the requirements of the trust, would, under such circumstances, be supplied by legal intendment.

Wilkinson vs. Rutherford, 49 N. J. L. 241;
Merchants Bank vs. Steel Co., 57 N. J. L. 336.

This is conceived, however, to be a wholly useless form.

It has been urged, however, that notwithstanding the Minnesota statute contemplates and provides for such a receiver, it does not expressly authorize suit to be brought by him.

In this respect no purpose can be conceived for the receiver in the absence of the power thus questioned.

The case therefore falls within the rule thus stated, "but to warrant them in the exercise of a power, it need not be expressly conferred, and if it can be fairly implied, either from the general scope and purpose of the statute, or as an incident to a power expressly given, there is sufficient warrant for its exercise."

High on Rec'rs. (3rd Ed.), sec. 322.

But conceding all that is contended for in this regard by petitioner, it has been strenuously asserted before the courts that the receiver is still lacking in authority *to sue in his own name as receiver.*

This objection has been so fully met in the decision of the Circuit Court of Appeals of the First Circuit, in Hale vs. Hardon, 95 Fed. Rep. pps. 770-775, and of the Supreme Court of Maine in Childs vs. Cleaves, supra, as to require little, if anything, to be added to what is there said.

The principles and reasoning of these cases is confirmed by the decision of the Supreme Court of Massachusetts and the Court of Appeals of New York.

Howarth vs. Lombard, supra;
Howarth vs. Angle, supra.

Considered in its strictly technical aspect, it will be found that the cases on which this objection is predicated, all relate to questions where the right of the receiver is asserted by virtue of succession to the *title* or *interest* of a party to the cause.

Glenn vs. Marbury, 145 U. S. 499.

None of these cases involved the question of the receiver's right where predicated of his representative capacity. In the latter it is believed that in all cases where the receiver's rights are asserted as representative of all creditor interests, the suit is necessarily brought in his own name.

Vol. 17, Ency. Pl. & Pr., 814, and cases;
Vol. 20, Am. & Eng. Ency. of Law (1st Ed.), 287, Note 4.

But, however this may be in the ordinary case, where the representative character results from a statute which by express provision or necessary implication contemplates the exercise of the power, the authority is clear.

Vol. 20, Am. & Eng. Ency. of Law (1st Ed.), 234;
Smith on Receiverships, sec. 70, supra.

Moreover, as respects corporations wherein the rights of all parties in interest are referable to the several laws affecting corporate organization, the right of the receiver therein contemplated, may be referred to and sustained upon the contractual principles sufficiently presented in our original brief.

In the foregoing we have attempted to review every form of objection or argument which has been presented upon this question in the varied litigation heretofore had in the courts in these cases.

The character and status of a statutory receiver is, of necessity, largely a question of local law.

If this be not the rule, it follows that the receivership which is an incident to a local statutory proceeding framed for insuring uniformity of right, and binding as such upon all parties in interest, is subject to diverse and variant interpretation in the different jurisdictions and thus destructive of the primary purpose of the statute itself.

The legislature of Minnesota provided that the court shall appoint one or more receivers. This, as heretofore shown, has been held and construed by the local courts as a statutory authority for the appointment of the particular receivers of the class here in question.

Harper vs. Carroll, supra.

It has further been held as investing the court with jurisdiction to authorize its receiver to institute ancillary or auxiliary proceedings in foreign forums.

Hanson vs. Davidson, supra.

This construction comports with the obvious purpose of the statute, and the general rule followed by the courts of that state in respect both to the receivership contemplated thereby, as well as ordinary equitable receiverships.

The first is illustrated by Minnesota Threshing Mfg. Co. vs. Langdon, 44 Minn. 37-39, wherein the court say.

"The receiver has substantially the same powers and functions as an assignee in bankruptcy, or a receiver upon a creditor's bill, or proceeding supplementary to execution. He succeeds to the rights of the creditors as well as of the insolvent corporation. * * * The proceedings were intended to provide a full and complete remedy. * * * Everything becomes assets in his hands * * * which were assets as to creditors. * * * This right

of the receiver does not depend upon any express statute granting it. This is clearly contemplated and even expressly provided for in the various provisions of chapter 76 relating to such proceedings. * * * It cannot be that this right of the receiver and the right of creditors can both exist at the same time. If so, it would lead to the worst confusion and conflict, and often defeat the main object of sequestration proceedings under chapter 76. The right of the individual creditor and of the receiver were never intended thus to conflict."

The language thus quoted was used with reference to the general receivership contemplated under the statute in question, but its reasoning and spirit is equally applicable to those portions of the statute specifically limited to the special receiverships here involved.

In Henning vs. Raymond, 35 Minn. 303-305, the court say of equitable receivers in general:

"The receiver as an officer of the court which has taken control of the property, is, for the time being, and for the purpose of the administration of assets, the real party in interest in the litigation. There is no reason therefore why the suit should not be instituted in his own name."

The local construction and interpretation are in legal contemplation, part of the statute.

As part and parcel therefore of the general scheme of sequestration provided by the statute, his appointment was contemplated and such appointment is the necessary incident in giving force and effect to the purposes of the law.

In this view from whatever standpoin it be regarded, whether from principle or precedent, no doubt can exist as to the receiver's capacity to sue in foreign forums.

As a statutory officer, the subject has already been considered in our principal brief.

But without regard to this aspect, the weight of authority in favor of according standing, is so far persuasive as to absolve the question from doubt.

The conclusions thus announced were fully confirmed by the Circuit Court of Appeals for the Sixth Circuit, in Kirtley vs. Holmes, 107 Fed. Rep. 1-8. This was a suit brought by the receiver appointed under the Ohio statute in a suit there pending, to enforce the liability of stockholders. Answering the objection that such a receiver had no standing in a foreign jurisdiction, the court say:

"Nevertheless, the right being of an equitable nature, and prosecuted for the benefit of all the creditors, it is recognized that a receiver may be appointed if the case be one where the receivers are appointed by the usages of equity, as is specifically provided by section 5587 of the Ohio Revised Statutes. The action being for the benefit of all the creditors, and having been instituted upon that theory in the Ohio Court, which is to ascertain the amount to be assessed against stockholders, and the creditors entitled to the benefit thereof, we think it is in harmony with the usages of equity to appoint a receiver who shall, under the direction of the court, bring an action in order to bring into the fund sums arising from the liability of stockholders beyond the jurisdiction of the court. The cause of action exists in favor of all creditors. It may be impracticable to unite all in the bringing of the action. A court of equity, in the exercise of its power to appoint a receiver, may well appoint one for the purpose of reaching such outstanding liabilities. The right of such a receiver appointed in another jurisdiction to maintain an action has been recognized in many well considered cases. A receiver's right to sue is recognized upon principles of comity, where no injustice would be done to the citizens of the local jurisdiction, or his recognition conflict with public policy. Howarth vs. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Same vs. Lombard, 175 Mass. 570, 56 N. E. 888; Howarth vs. Ellwanger (C. C.) 86 Fed. 54; and Hale vs. Hardon, 37 C. C. A. 240, 95 Fed. 747."

The same principles were asserted and applied by the Circuit Court of Indiana (Burr vs. Smith, 113 Fed. 858), on objection to the capacity of a receiver appointed under the Ohio Statute, to sue in a foreign jurisdiction.

Passing thereon, Judge Baker said as follows:

"When a state by its statute creates a liability unknown to the common law, can it be successfully contended that it may not determine by whom, and in whose name, that liability may be enforced? The statute of Ohio invested the receiver, when duly appointed, with the right to maintain a suit to enforce the stockholder's liability for the benefit of the creditors of the corporation, and on what principle of justice or comity can the courts in a sister state refuse to permit the receiver to maintain an action, to enforce such liability? Such a receiver is something more than an ordinary chancery receiver appointed to take possession of the property and collect the debts owing to a corporation or an individual. The present receiver was appointed to enforce for the benefit of creditors liabilities to which the corporation had no right or title. Formerly the primary object of a receiver's appointment was to preserve the fund or property so that it might be appropriated as the final decree of the court should direct. In recent times, how-

ever, both in England and in the United States, there has been a strong tendency towards enlarging the scope of the receiver's powers. The general rule as to receiver's title is greatly modified in the case of a receiver appointed at the suit of judgment creditors. In such cases he is appointed, not alone for the purpose of preserving the property, but also to reduce property and effects into possession, and to distribute the proceeds among the creditors. Hence the receiver is usually given authority to maintain suits in his own name to enable him effectively to carry out the purpose of his appointment."

After referring to expressions contained in certain cases denying recognition to receivers in foreign jurisdictions, the court continues:

"But expressions of this character have been considered to go too far, and the correct and current doctrine appears to be that under the principle of comity the courts of one jurisdiction will recognize the authority and permit the exercise of the functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy would be displaced or the rights of its own citizens invaded or impaired, and this seems to be especially true where such receiver is, by the terms of his appointment, to gather in the assets wherever found. 20 Am. & Eng. Enc. Law (1st Ed.) 65, 66. The doctrine thus stated is supported by reason and by the great weight of authority in the courts of the United States. The nature of the union between the states as members of a common government, the intimate and vital interests and relations, commercial as well as political, which bind them together, should lead to a greater degree of comity between them than would be expected to exist between states wholly foreign to each other. This principle of comity between the states of the Union is now generally recognized."

The court next considers the case of Booth vs. Clark, 17 How. 322, and shows that the facts presented in that case have no bearing upon, and the decision there rendered is not an authority against the conclusions announced by it, citing Insurance Co. vs. Schultz, 80 Fed. Rep. 337; Hale vs. Hardon, 95 Fed. Rep. 747; and Kirtley vs. Holmes, 107 Fed. Rep. 1.

The modern trend of authority sustaining the rule of comity will sufficiently appear from the following:

"Conceding that the officer is vested with this fullness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign states is regulated that every government, when its tribunals are appealed to, shall render

every assistance in its power in furtherance of the execution of such authority, except in those cases where, by so doing, its own policy would be displaced, or the rights of its own citizens invaded or impaired."

Gluck & Becker on Receivers (2nd Ed.), 223.

"It is thus apparent that the exceptions to the rule denying to receivers any extra-territorial right of action have become as well recognized as the rule itself, and the tendency of the courts is constantly toward an enlarged and more liberal policy in this regard. And it is believed that the doctrine will ultimately be established giving to receivers the same rights of action, in all states of the Union, with which they are invested in the state or jurisdiction in which they are appointed."

High on Receivers (3rd Ed.), 211.

"Generally, however, a foreign receiver is allowed to carry on litigation if the interests of resident creditors are not injured, and if justice will be promoted by sustaining his suit."

Vol. 3, Cook on Corp. (4th Ed.,) sec. 869.

"At an early period of our American jurisprudence, when the tribal theory—the theory of a mere league of independent sovereign states—as uppermost in the minds of judges as the theory of the relation of the American states *inter sese*,—it was seldom, if ever, that a receiver appointed in one state was permitted to maintain an action in the courts of another state. * * * The tendency is more and more to respect each other's laws and judicial proceedings, and to enlarge the principle of comity, which gives effect to them. * * * As between sister states of the American Union, the principle now generally acted upon is, that a receiver, appointed in another state, will be permitted, on the principle of comity, to bring an action in the domestic forum, * * * when so to do will not contravene the rights of citizens of the domestic state."

Vol. 6, Thompson on Corp., secs. 7337-7339.

See also,
Buswell vs. Order Iron Hall (Mass.), 23 L. R. A. 846;
Boulware vs. Davis (Ala.), 23 L. R. A. 601;
Ins. Co. vs. Wright (Vt.), 55 Vt. 526;
Cook vs. Orange (Conn.), 48 Conn. 401;
Hunt vs. Gilbert (Ill.), 54 Ill. App. 491;
Weil vs. Bank (Mo.), 76 Mo. App. 35;
Bank vs. McLeod (O.), 38 O. St. 174;
Hurd vs. Elizabeth (N. J.), 41 N. J. L. 1;
Stoddard vs. Lum, 159 N. Y. 265-276.

In the foregoing review the purpose has been to bring to light and answer all the varied, abstract and technical theories which have been urged upon the courts in these cases, in opposition to the right of the receiver to sue.

The narrow, illiberal and unsubstantial character of all these objections cannot fail to impress itself upon the mind of the court.

We have called attention to the fact that none of these objections or decisions made sustaining the same have in anywise suggested, in what manner or by whom, this contractual liability should be enforced in foreign jurisdictions.

The dividing line in these cases is strongly marked between those on the one hand, which apply a broad, liberal and just interpretation of the statutory obligation with the rights thereby created, and as thus construed have sanctioned a remedy which fully comports with the spirit of the statutes and subserves the rights of those claiming thereunder. On the other hand will be found a strained and studied attempt to ignore liberal rules and defeat the obvious intent of the statutes.

The one line of decisions is indicative of a spirit of harmony in the intercourse between the citizens of the various states and is illustrative of the spirit of comity which, in these days, with the tendency toward corporate organization in all lines of business, is absolutely indispensable. The other is the exact reverse,—illiberal, non-progressive and obstructive.

As between these two, it is not difficult to conceive which, in the long run, is inevitably bound to prevail.

Respectfully submitted,

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